No. 172.

Brief of Atty. Gen. Richards
for Appellee

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

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v.
EUGENE D. WINNEY, UNITED STATES MARSHAL FOR THE EASTERN DISTRICT OF MICHIGAN. } No. 172.

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STATEMENT.

This is an appeal from the decision of the United States circuit court for the eastern district of Michigan, remanding the appellant, Thomas Cosgrove (brought before it on a writ of habeas corpus), to the custody of Eugene D. Winney, United States marshal for that district.

Cosgrove, a resident of Sarnia, in the Dominion of Canada, was extradited from Canada on a charge of larceny pending in the police court of Detroit, Mich. Brought into that court, he gave bail for his appearance in the recorder's court of that city and was released from

custody. Thereupon he returned to Canada. Subsequently he came voluntarily within the United States, at Port Huron, Mich., and was arrested on a capias issued upon an indictment pending in the United States district court for the eastern district of Michigan for the offense of obstructing a United States marshal in the execution of a writ of attachment, this alleged offense having been committed prior to his extradition on the charge pending in the State court. To secure his release, Cosgrove applied for a writ of habeas corpus, claiming that having been extradited for larceny he could not be arrested and tried for obstructing an officer. The writ was granted, the marshal made his return, and the case was heard upon the petition and the return, the averments of the latter not being denied.

THE PETITION FOR THE WRIT (Record, pp. 1 to 6).

The petition, after reciting Cosgrove's arrest by the United States marshal on the indictment pending in the United States district court, says that at the time this arrest was made he was under arrest caused by a complaint filed in the police court of Detroit charging him with larceny, on which he had been extradited from Canada. Being brought before the police court of Detroit in June, 1896, he was examined and bound over for appearance and trial in the recorder's court of Detroit, at the July term, 1896. He says he has not yet been tried, released, or discharged by the recorder's court, and is still in its custody. The petition further shows that the crime for which Cosgrove was arrested by the United States marshal was committed, if at all,

prior to his extradition from Canada. He submits that he can not be tried for any offense alleged to have been committed prior to his extradition until he shall have had a reasonable time and opportunity, after his release or trial upon the charge for which extradited, to return to Canada, as provided by the treaty and laws governing his surrender.

THE RETURN OF THE MARSHAL (Record, pp. 6, 7).

The marshal, after producing and describing the capias, says:

> I further return that the date of the capture of said Thomas Cosgrove, under said capias, was the 10th day of December, 1896; *the place, Port Huron, in said district*, and the cause as specified in said capias was the filing of an indictment by the grand jurors for said district against him on a charge of obstructing the United States marshal in the execution of a writ of attachment. The place of detention of said Thomas Cosgrove is the Wayne County jail in Detroit, in said district. *That said Thomas Cosgrove, at the time of his arrest on said capias, was not in custody upon a warrant issued out of the police court of the city of Detroit*, as set forth in the petition, but before that time, had entered into recognizance to appear and answer an information to be filed against him in the recorder's court of the city of Detroit for the offense charged on said warrant, and at the time said Cosgrove was taken into custody upon said capias, he was at large upon bail before then given. *And I further return that after said Cosgrove was brought to the city of Detroit by virtue of the extradition proceedings, referred to in his petition for this writ, and before his arrest upon said capias,*

he had returned to the Dominion of Canada, and after said return and before his arrest on said capias, he voluntarily came into the United States, to the State of Michigan, and was then found at large after his said voluntary return, and was then arrested upon said capias while so voluntarily in the State of Michigan.

From this return, which was not traversed and must be taken as true, it appears that the presence of Cosgrove at Port Huron, in the State of Michigan, and within the United States, at the time of his arrest, was in no way connected with his extradition. It is not claimed that he returned to Michigan from Canada to prepare for or to attend his trial, or at the instance of his bail. The return states that "he voluntarily came into the United States, to the State of Michigan, and was then found at large after his voluntary return, and was then arrested upon said indictment *while so voluntarily in the State of Michigan.*" If he came into the United States on any matter in anywise connected with his extradition, it could not be said that he came voluntarily. Coming into the United States at the call of the sureties on his bail bond, or to prepare for his trial, or to attend his trial, would be a coming under compulsion. But he came voluntarily, and, while so voluntarily within the United States, was arrested.

The appellant contends that, under article 3 of the extradition convention between the United States and Great Britain, promulgated March 25, 1890 (26 Stats., 1508), and section 5275, Revised Statutes, he is exempt from arrest for an offense committed prior to his extradition and other than that for which he was surrendered

until a reasonable time after his trial on the charge for which he was surrendered and until he shall have had an opportunity of returning to the country from which he was surrendered.

Article 3 of the extradition convention reads:

> No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense, committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.

By section 5275 of the Revised Statutes it is provided:

> Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused.

The Government concedes that Cosgrove could not be tried for an offense, other than that for which he was surrendered, committed prior to his extradition, without having had an opportunity to return to Canada; but it

submits that Cosgrove, after he was extradited, had an opportunity to return to Canada, for he did return to Canada, and that his subsequent presence in the United States was not enforced but voluntary. This voluntary presence in the United States rendered him liable to arrest for any crime, for the exemption of the treaty applies only when the accused is brought within the United States to answer a specific offense and is kept here under compulsion of law for that purpose alone. In this case, the conceded fact outweighs the legal fiction; the voluntary return excludes the presumption of a compulsory presence.

ARGUMENT.

I.

There is practically no dispute about the law. I concede that a man can not be extradited from Canada for one offense and tried for another, committed prior to his extradition, without having had an opportunity of returning to Canada. But the controversy arises, as most do, from the application or attempted application of the law to the facts. Did Cosgrove have an opportunity of returning to Canada? Does the exemption apply under the peculiar circumstances of this case? The treaty provides that the surrendered person shall have an opportunity of returning. Why? That he may return if he desires to, and if he does not and stays, that his presence may not be compulsory, but voluntary. He is secured the right to return because, once within his own country, he is beyond the jurisdiction of the country to which he

had been conveyed for trial upon a specific charge. He can not be compelled to put himself in its power again except by further extradition proceedings. Of course, if he voluntarily returns, it is at his peril. His asylum (if I may use that term) is his own land, the country from which he was extradited. The treaty protects him by insuring his return to it after answering the charge for which he was extradited. If after his return he leaves his own country, his asylum, not by constraint of law, but to serve his own ends, he puts himself within the jurisdiction and power of the country whose law he is charged with violating, and is in no position to appeal either to its courts or to his own Government, for exemption from trial and punishment.

II.

Fundamentally each nation is sovereign and supreme within its own territory. It does not have to deliver up to another alleged fugitives from justice found within its borders, and it may arrest, try, and punish any violator of its own law that it can lay its hands on.

In the case of *United States* v. *Rauscher* (119 U. S., 407), where this court held, Mr. Justice Miller delivering the opinion, that under our treaty with England a man extradited for one crime could not be tried for another growing out of the same transaction, the court was careful to base its decision upon the special provision of the treaty, saying (page 411):

> It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice

> to the States where their crimes were committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.

Mr. Chief Justice Waite, in his dissenting opinion, adverts to the fundamental rule recognized in this country in these words (page 434):

> I am unable to concur in the decision in this case. A fugitive from justice has no absolute right of asylum in a country to which he flees, and if he can be got back within the jurisdiction of the country whose laws he has violated he may be proceeded with precisely the same as if he had not fled, unless there is something in the laws of the country where he is to be tried, or in the way in which he was got back, to prevent.

III.

A fugitive from justice acquires from that fact alone no right of asylum in a foreign country, which exempts him from trial here, if he falls within the clutches of the law. Let the law once lay its hand on him, whether he is lured within its reach by fraud, or brought here by force, or thoughtlessly or unwittingly comes voluntarily

within our jurisdiction, once here and once in the hands of the law, he must stand his trial and submit to the punishment the law may inflict for his crime.

In *Ex Parte Brown*, 28 Federal Reporter, 653 (1886), it was held that a fugitive from justice charged with crime will not be released, on habeas corpus, because he was induced by stratagem to come within territory where he could be properly arrested. Brown was indicted in Erie County, Pa., for perjury. He fled to Canada. He was induced by the false statements of parties employed by those interested in his conviction to come into the State of New York, where he was arrested. He insisted that he was not a fugitive from justice, his presence in New York having been obtained by fraud. Coxe, J., delivering the opinion, says, page 655:

> The question remains, Was the duty of the executive to deliver up the petitioner at all affected by the fact that he was induced by the trickery and fraud of private parties to come within this jurisdiction? I am entirely clear that it was not. The contention that a party charged with crime is entitled to be released on habeas corpus, because, by a stratagem,—which, though morally reprehensible, is not criminal, in a legal sense,—he is induced to come within territory where he may be properly arrested, is not supported by a single authority.

Page 656:

> The criminal law, administered, as it is, for the protection of the whole people, does not take cognizance of the means by which alleged offenders are apprehended, so long as no act is done which in itself is an infraction of the law.

In *Ker* v. *Illinois* (119 U. S., 436) it was held that a criminal obtains no right of asylum in the foreign country to which he flees. Ker was under indictment in Illinois for larceny. He fled to Peru. A messenger with a warrant for his extradition went to Peru, but instead of applying to the authorities of Peru for Ker's extradition, kidnaped him and brought him back to the United States. Then Ker applied for a writ of habeas corpus, alleging that his right of asylum had been violated. The court held that once within the United States he was subject to arrest and prosecution here. It did not matter how he got here.

Mr. Justice Miller, speaking for the court, said, page 442:

> There is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. It will not be for a moment contended that the Government of Peru could not have ordered Ker out of the country on his arrival, or at any period of his residence there. If this could be done, what becomes of his right of asylum?

And on page 444:

> The question of how far his forcible seizure in another country and transfer by violence, force, or fraud to this country could be made available to resist trial in the State court, for the offense now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do

> not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court.

Mr. Justice Miller concludes with the comforting suggestion that Ker is not without a remedy. "He could sue Julian (the messenger) in an action of trespass and false imprisonment."

In the case of *Mahon* v. *Justice* (127 U. S., 700), a fugitive from the justice of Kentucky was kidnaped in West Virginia and forcibly carried back to Kentucky, where he was held for trial on a criminal charge. The governor of West Virginia demanded his restoration to the jurisdiction of that State, which, being refused, his release was sought by habeas corpus. The court declined to release him. After reviewing a number of cases upon the subject, Mr. Justice Field, speaking for the court, said, page 712:

> Other cases might be cited from the State courts holding similar views. There is indeed an entire concurrence of opinion as to the ground upon which a release of the appellant in the present case is asked, namely, that his forcible abduction from another State, and conveyance within the jurisdiction of the court holding him, is no objection to his detention and trial for the offense charged. They all proceed upon the obvious ground that the offender against the law of the State is not relieved from liability because of personal injuries received from private

> parties, or because of indignities committed against another State. It would indeed be a strange conclusion, if a party charged with a criminal offense could be excused from answering to the government whose laws he had violated because other parties had done violence to him, and also committed an offense against the laws of another State.

In *Lascelles* v. *Georgia* (148 U. S., 537) this court, speaking by Mr. Justice Jackson, held that a fugitive from justice who has been surrendered by one State to another State upon a requisition charging him with a specific crime may be arrested and prosecuted for another and different crime without first having an opportunity to return to the State from which he was extradited. After stating the argument urged by counsel for Lascelles, Mr. Justice Jackson says (page 542):

> But the fallacy of the argument lies * * * in the further assumption that a fugitive from justice acquires in the State to which he may flee some State or personal right of protection, improperly called a right of asylum, which secures to him exemption from trial and punishment for a crime committed in another State, unless such crime is made the special object or ground of his rendition.

Page 543:

> But it is settled by the decisions of this court that, except in the case of a fugitive surrendered by a foreign Government, there is nothing in the Constitution, treaties, or laws of the United States which exempts an offender, brought before the courts of a State for an offense against its laws, from trial and punishment, even though brought from another State by unlawful violence, or by

abuse of legal process. (*Ker* v. *Illinois*, 119 U. S., 436, 444; *Mahon* v. *Justice*, 127 U. S., 700, 707, 708, 712, 715; *Cook* v. *Hart*, 146 U. S., 183, 190, 192.)

IV.

The exemption provided by the treaty is, as I have shown, an exception to the principle of territorial sovereignty, but it is an exception which appeals to our sense of justice and fairness. There is a general rule that when the law compels a person to attend at a particular place, away from his home, for one purpose, it will protect him against an unfair advantage being taken of his presence there for another purpose. As Judge Cooley said, in an article in the Princeton Review of January, 1876, quoted in Hawley on Extradition, bottom page 11:

> To obtain the surrender of a man on one charge and then put him upon trial on another is a gross abuse of the constitutional compact. We believe it to be a violation also of legal principles. It is a general rule, that where, by compulsion of law, a man is brought within the jurisdiction for one purpose, his presence shall not be taken advantage of to subject him to legal demands or legal restraint for another purpose. The legal privileges from arrest when one is in the performance of a legal duty away from his home rest upon this rule, and they are merely the expressions of reasonable exception from unfair advantages.

So in *Frank Cannon's Case* (47 Mich., 481), Cannon was extradited on a charge of seduction, and while on bail under this charge was arrested on a complaint for bastardy. He was discharged by habeas corpus, Judge

Campbell delivering the opinion, on the ground that an enforced presence within the jurisdiction of the State to answer a criminal charge could not be taken advantage of by the authorities in order to subject him to a civil prosecution.

Page 486:

> It is the law of this State, whatever doubts may exist elsewhere, that when the law compels a person to attend at a place away from that where he is abiding, it at the same time usually protects him from having undue advantage taken of his unwilling and enforced presence. And this is no more than simple justice. Everyone in legal custody has a right to legal protection. Accordingly it was held in *Watson* v. *Judge of the Superior Court of Detroit* (40 Mich., 729) that an arrest in a State court of a person attending under process of a Federal court, was unlawful, and should not be permitted whether the Federal court interfered or not. The question was fully discussed on its general merits, and the very well considered case of *Commonwealth* v. *Hawes* (13 Bush, Ky., 697) was referred to with approval, as declaring the correct doctrine on the subject. It was claimed on the argument here that while that case may have been properly decided as applicable to extradition treaties with other nations, it had no bearing on extradition between States. We do not perceive any ground for the distinction.

I quote the language of Judge Cooley in the Princeton Review, and of Judge Campbell in Frank Cannon's Case, to emphasize the fact that the exemption is based upon and accompanies enforced presence by compulsion of law within the jurisdiction. If there be no compulsory presence there can be no exemption. Legal pro-

tection goes along with legal compulsion. When for any cause the presence of a person becomes voluntary, then the protection of the law ceases. In the case of *Commonwealth* v. *Hawes* (13 Bush (Ky.), 697), in which it was held that a man extradited from Canada for forgery could not be tried for embezzlement or for uttering forged paper, the court (Chief Justice Lindsey delivering the opinion) took pains to guard the right of the State to try Hawes for embezzlement and for uttering forged paper, in case he should come voluntarily within its jurisdiction. Page 713:

> He is not entitled to personal immunity in consequence of his flight. We may yet try him under each and all of the indictments for embezzlement and for uttering forged paper, if he comes voluntarily within the jurisdiction of our laws, or if we can reach him through the extradition clause of the Federal Constitution, or through the comity of a foreign government.

In the case before the court, Cosgrove came voluntarily within the jurisdiction of our laws, and so we can try him without regard to the offense for which he was extradited.

V.

But the appellant insists that being on bail he remained, until his bail should be discharged, in the custody of his sureties, and therefore, until tried on the charge for which extradited or released from bail, was exempt from arrest and trial on any other charge.

I am quite willing to concede that if Cosgrove had remained in the State of Michigan, within the United

States, under the jurisdiction of this Government, and within reach of his bail, he would be exempt as he claims. But this is on the theory that his bail keeps him here, and that it violates the treaty and takes unfair advantage of his enforced presence to arrest and try him for a charge other than that for which he was extradited. But when he leaves this country and goes back to Canada, what becomes of the compulsion of his bail? It amounts to nothing in law. His sureties can not follow him into Canada and arrest and bring him back. He is free to come back or not, as he pleases. The only constraint is a moral one—an obligation of honor not to leave his sureties in the lurch; and a compensation in money, a *quid pro quo*, will satisfy that.

Opposing counsel cites a number of authorities to the effect that a principal is regarded as within the custody of his sureties. So he is, but the first duty of the sureties is to keep the principal within the jurisdiction of the court. Out of it, their custody also ends with the jurisdiction of the State. I beg to refer to a few cases upon this point.

In *Reese* v. *United States* (9 Wall., 13) it was distinctly held that the power of sureties to arrest does not extend beyond the jurisdiction of the United States. It appears that in this case the Government agreed with one Limantour, under indictment in the United States court, and who had given bail for his appearance, that his case might be postponed to an indefinite future term, to await a decision in certain civil cases pending in the United States court, on an appeal from the decision of the California land commissioners. In the event of the decision

in the civil cases being adverse to Limantour, he was to stand his trial on the criminal charge; otherwise and in the event of his success in the civil suits the criminal prosecution was to be dismissed. Under this understanding and consent of the United States attorney, he went to Mexico and never returned. He was beaten in the civil suits, and failing to return his sureties on the bail bond were sued. The court held, speaking by Mr. Justice Field, that under the circumstances they were discharged.

Bottom p. 21:

> There is also another view of the stipulation which leads to the same result. By the recognizance the principal is, in the theory of the law, committed to the custody of the sureties as to jailers of his own choosing, not that he is, in point of fact, in this country at least, subjected or can be subjected by them to constant imprisonment; but he is so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to the court, and, to the extent necessary to accomplish this, may restrain him of his liberty. *This power of arrest can only be exercised within the territory of the United States; and there is an implied covenant on the part of the principal with his sureties, when he is admitted to bail, that he will not depart out of this territory without their assent.* There is also an implied covenant on the part of the Government, when the recognizance of bail is accepted, that it will not in any way interfere with this covenant between them, or impair its obligation, or take any proceedings with the principal which will increase the risks of the sureties or affect their remedy against him. * * *

> The Government thus consented that Limantour might depart out of the territory of the United States to a foreign country, *where it would be impossible for the bail to exercise their right to arrest and surrender him;* and further, it consented that he might remain abroad for a period of indefinite duration. This was all done without the concurrence or even knowledge of the sureties, whose risks were thus greatly increased.

In *Taylor* v. *Taintor* (16 Wall., 366) this court held that the sureties of a party out on bail under a criminal charge were not released by his arrest in another State, whither he had gone with their consent, on another criminal charge. The sureties were bound to keep their principal within the jurisdiction of the court and to have his person ready to surrender when demanded. Their negligence or connivance, in permitting their principal to go beyond the jurisdiction of the court and within the jurisdiction of another State, could not relieve them from liability on their bond.

In *United States* v. *Van Fossen* (1 Dill., 406) Judge Dillon took the view that it was no defense to an action against the sureties on a bond in a criminal case that the principal had gone beyond the jurisdiction of the court, and into another State, and committed an offense against its laws, for which he was arrested. *It was the duty of the sureties to prevent their principal going beyond the jurisdiction of the court.*

In *Devine* v. *The State* (5 Sneed, 623), it was held that the sureties of a defendant admitted to bail on criminal charge have custody of his person and are

bound at their peril to keep him within the jurisdiction of the court. If they become apprehensive for their own safety, they can arrest and commit him to prison at any time.

Judge McKinney says, page 625:

> In legal contemplation, upon the recognizance being entered into, the principal was delivered into the "friendly custody" of his sureties, instead of being committed to prison. (4 Bl. Com., 301.) *The sureties had control of his person; they were bound at their peril, to keep him within the jurisdiction, and to have his person ready to surrender when demanded.* If apprehensive for their own safety, they had the right to arrest and commit him to prison at any time, so as to have him forthcoming to answer the charge to which he had been indicted, as they had voluntarily undertaken to do. And if they negligently permitted him to go beyond their reach, it was their own folly, and they must abide the consequences.

It appears, therefore, from these cases that when Cosgrove left the United States and returned to Canada he violated the implied covenant which he had with his sureties, when admitted to bail, that he would not depart out of this country without their assent (*Reese* v. *United States*, 9 Wall., 13, 21); and if he departed from the United States with the assent of his sureties, then they violated their obligation with the State, because they were bound to keep him within the jurisdiction of the court and to have his person ready to surrender when demanded. (*Taylor* v. *Taintor*, 16 Wall., 366; *United States* v. *Van Fossen*, 1 Dall., 406; *Devine* v. *The State*, 5 Sneed, 623, 625.)

VI.

The appellant invokes the protection of section 5275 of the Revised Statutes, but the protection afforded by this section only operates while the extradited person is within the United States, brought here and kept here to answer a charge for which he was extradited. If the extradited person departs from the United States, he abandons the protection which this section offers. He seeks by choice the protection of his own country in thus returning to it. If he leaves it afterwards, except in connection with his extradition, he does so at his own risk, and if arrested within the territory of the country whose law he is charged with violating, there is nothing in the treaty or in the laws of this country to stand in the way of his trial and punishment.

In returning to Canada Cosgrove broke the covenants and obligations of his bail, because he put himself out of the reach of his sureties and beyond the jurisdiction of the court. I do not contend that if he had come into the United States on a matter connected with his extradition, to prepare for or attend his trial, he would be subject to arrest and prosecution for another offense. Presence in the United States in connection with his extradition would not be voluntary but compulsory. In this case his presence here was voluntary; he returned of his own choice and for his own private purposes. Under these circumstances he was not under the protection of the treaty or the statute, but liable to arrest and prosecution.

Suppose Cosgrove, instead of being bailed, and of returning to Canada as he did, had been imprisoned in Michigan and had broken jail and returned to Canada, but subsequently, for some private reason unconnected with his extradition, voluntarily came within the United States. Will it be claimed that the protection of the treaty and of our statute attached to him as soon as he struck our soil?

JOHN K. RICHARDS,
Solicitor-General.

JANUARY 24, 1899.